Supreme Court of the United States.

No. 240.

SULLIVAN & AL., TRUSTEES IN EQ.,

vs

PORTLAND & KENNEBEC R. R. CO. & AL., TR.

Appeal from the Circuit Court of the United States for the District of Maine.

ARGUMENT FOR P. & K. R. R. CO., & PATTEN TR.

BY

JAMES W. BRADRURY.

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A BRIEF STATEMENT

Of the leading facts will facilitate an understanding of the questions arising in this case:

The Kennebec & Portland Railroad Company, a legally organized corporation, was authorized by its charter to construct and maintain a railroad from the city of Portland, through North Yarmouth and other intermediate towns, to Augusta, with a branch to Bath, the whole length being about seventy miles. After the road had been located and partially constructed, it was found necessary to raise means for its completion and equipment, additional to the amount received from the subscribers to the stock, and four mortgages upon the road and its franchise were made for that purpose.

1. *Oct.* 8, 1849, the portion of the road between North Yarmouth and Portland (about twelve miles,) was conveyed in trust and mortgage to Reuel Williams, John Patten and J. B. Carroll, trustees, to secure $202,400 advanced to the company by contributors, with ten per cent. interest thereon.

2. *Nov.* 1, 1850, the whole line of the road was mortgaged to commissioners of the sinking fund to, secure $800,000 advanced by sundry cities, towns and individuals.

3. *Oct.* 17, 1851, the road and franchise were mortgaged to John Patten, Joseph McKeen and M. S. Hagar, trustees, to secure bonds of the company to the amount of $230,000, known as First Mortgage Bonds.

4. *Oct.* 15, 1852, the road and franchise were again mortgaged to the same Trustees to secure another issue of bonds then made to the amount of $250,000, known as the Second Mortgage Bonds.

On the 7th of October, 1852, at a meeting of the Kennebec & Portland Railroad Corporation, it was voted "That the Trustees be and are hereby authorized to waive in behalf of this company their existing right to redeem their road from North Yarmouth to Portland at pleasure, and upon an endorsement upon their certificates issued to the contributors to build said road, by the treasurer of said road, to make the same irredeemable until Nov. 1, 1870; provided the holders of said certificates shall, by their endorsement upon the same, authorize and empower the Trustees aforesaid, after paying to such certificate holders three per cent. semi-annually, upon the amounts severally represented by their said certificates, to pay over semi-annually to the Treasurer of this company, *for the use and benefit of this company*, the balance of the income (for interest) which stockholders are now entitled to recover, (viz: two per cent.,) to be by him held and appropriated so far as may be required, or as the same may go, to the payment of interest to such of the preferred stockholders as shall surrender their old certificates of stock and receive new certificates of preferred stock, bearing three per cent. interest or income semi-annually, in lieu of five per cent., as now entitled: said payment of three per cent. to the holders of said certificates, and of the balance aforesaid to the Treasurer, by the said Trustees, semi-annually, to be in full for the annual income of ten per cent. to which said certificate holders are now entitled."

It was also voted that in case the arrangement should be effected with the contributors to the North Yarmouth road, the amount so paid into the hands of the Treasurer of the company should be by him reserved and appropriated, so far as it may be required, or as the same may go, to the payment of the three per cent. semi-annually, to such of the stockholders of the preferred stock as shall surrender their old certificates of stock and receive new certificates bearing that per centage instead of five as now entitled.

At a meeting of the Directors, on the 4th of March, 1853, it was voted that whenever the arrangement contemplated in the vote of the stockholders at their last annual meeting in regard to the North Yarmouth and preferred stock of the Kennebec & Portland Railroad shall be completed, the President and Treasurer shall be authorized to issue new certificates to holders of preferred stock for the amount of their present preferred stock and interest, promising six per cent. instead of ten per cent. annually, and that such new certificates shall entitle the holders thereof to all the privileges and benefits of the votes of the stockholders constituting the proposal.

The President was also authorized to waive the right of redeeming the North Yarmouth stock until Nov. 1, 1870. A similar vote was passed July 16, 1853.

Dec. 16, 1853, a vote was passed by the Directors authorizing the Treasurer to pay, on the 1st of January next, three per cent. on all the preferred stock which shall have been changed from ten to six per cent. stock.

None of the holders of the preferred stock accepted the proposal of the stockholders until Sept. 1, 1853, when the first new certificate for six per cent. was issued by the Directors of the company.

The statement in plaintiff's brief, on the first page, that "Before the vote authorizing defendant's mortgage was passed, the Kennebec & Portland Railroad Co., mortgagors, and the Yarmouth stockholders, equitable mortgagors, entered into an agreement which was signed by the President and each stockholder, and endorsed on every certificate of Yarmouth stock," is not correct. See record, page~~s~~ 36-50-51

To proceed with the history, the evidence shows that in 1855 the corporation became embarassed, and finally failed and became hopelessly bankrupt. To obviate the difficulties arising from the repeated attachment of its fuel and other attachable property not embraced in the mortgages, the Directors, by vote of Aug. 18, 1856, proposed to give nominal possession of the road and equipments to the Trustees of the second mortgage bonds, upon certain conditions specified in the vote. This possession by the Trustees was merely nominal. The Directors were to manage and operate the road for the Trustees, and pay the earnings to Reuel Williams, for many years President of the corporation and principal manager of its affairs. This arrangement was terminated at the end of the year.

April 1, 1857, the Legislature passed an act providing a mode of foreclosing mortgages given by railroad corporations.

The act also conferred authority upon Trustees, in such mortgages, to operate the road in certain cases. It is made the duty of the Trustees, upon breach of condition of the mortgage, to call a meeting of the bondholders, who are authorized at such meeting to organize, and to determine in regard to the expediency of having the Trustees enter into possession of the road for the purpose of running and managing it on their behalf. And if instructed by the bondholders so to do, the Trustees are required to take possession of the road and operate it on behalf of such bondholders, and apply the earnings, after payment of the expenses of operating, according to the legal rights of the parties interested.—Revised Statutes of Me. 1857, Ch. 51.

Under the provisions of this act the Trustees of the second mortgage bondholders, being required so to do, took possession of the road Sept. 1, 1857, and continued to operate and manage it, and to apply the earnings, as prescribed by the act, until Sept. 1, 1860, when, under similar proceeding, they took possession as Trustees of the first mortgage bondholders, and managed it on their behalf, and appropriated the earnings as aforesaid until Jan. 1, 1864. Transcript pp 41-45-46.

On the 18th of May 1859 the trustees, being required so to do by the bondholders, commenced proceedings for the foreclosure of the second mortgage, under the provisions of the act of April 1, 1857. These provisions, as the Supreme Judicial Court of our state have decided, are substantially the same in respect to the foreclosure of mortgages as were embraced in the previous statutes then in force. Kennebec & Portland Railroad Co., v Portland & Kennebec Railroad Co., 59 Me. 9—

This foreclosure was perfected and became absolute in May, 1862.

In November 1862 the bondholders, when mortgage had thus been foreclosed, formed themselves into a new coporation, under the provisions of the statutes, that they might have the benefit of the mortgaged property, and adopted the name of the Portland & Kennebec Railroad Company.

The foreclosure had became a necessity, as a bankrupt company could not operate the road, and the Trustees had not the requisite authority to raise the means necessary to put the road and equitments in the condition required.

Jan. 1, 1864 the Trustees conveyed to the new copoaation, in pursuance of the requirements of the statutes, the title secured to them as Trustees for the benefit of the bondholders by the mortgage of Oct, I5, 1852, and said company went into possession of the road.

Such is a brief outline of the principal facts in this case. There is much in the complainants bill that should be eliminated—much that has no bearing upon the question involved.

In the outset the fact presents itself that this is a stale demand —a claim for dividends made by preferred stockholders in an insolvent corporation that failed more than twenty years ago, and became so hopelessly bankrupt that its stock was regarded as worthless, to be had without price by any specalator who would consent to take it. It has laid dormant all that time, untill the attempt by this suit to galvanize it into life.

K+PRR Co v P+KRR Co 54 Me 173

Objection is made to the foreclosure of the mortgage, although the complainants allege no tender, and make no offer to pay such amount as should be found due if allowed to redeem, as by the laws of the state they could be required to do to sustain a bill to redeem.

It is howeaer a conclusive answer to this part of the case that this very question of foreclosure has been before the Supreme Judicial Court of our State, and it has been decided that the foreclosure was valid.

The suit was bought by the corporation in which the complainants were stockholders, and in their behalf.

K. & P. R. R. v P. & K. R. R. & als., 59 Me. 9.

This decision of the State Court, that the foreclosure was in con-

formity with the laws of the State, that it was not only valid under the acts of 1857, but that the method pursued was in strict conformity to the mode of foreclosure, authorized when the contract was made, is a legal bar to this part of the complainant's bill. This court will not inquire whether the Supreme Court of the United States was right in that decision. It related to the construction of the laws of the State, and must be regarded as furnishing a rule of decision to the Federal Courts in this case.

The case was also brought before this Court by writ of error, and the question now presented was considered by the Court, and the writ dismissed.—Kennebec Railroad Co. v Portland Railroad Co., 14 Wall. 23.

As to the charge of conspiracy and fraud contained in the complainant's bill, it is a sufficient legal answer to say that it is *res adjudicata*,—the decree dismissing the bill is a valid defence. This question was fully presented in the case above cited, and a judgment against a corporation estops its stockholders.—Milliken v Whitehouse, 49, Me., 527.—But I feel constrained to add in behalf of the honorable men thus assailed, that not only was the charge unsustained by evidence, but that it was conclusively disproved by a mass of testimony satisfactory to the whole court.

Every allegation was met and shown to be groundless, and refuted. The Trustees discharged the duty they were by law required to perform. They did this with fidelity. They operated the road skillfully and economically, more so than the corporation had done before them. They scrupulously and honestly applied the earnings as they were by the statutes under which they were in possession, required to apply them, according to the legal rights of the parties. They published a report of their doings annually, and no complaint was ever made of negligence, mismanagement or fraud.

The principal claim of the complainants rests on the arrangement under which the four per cent. was released from the Yarmouth scrip.

What was the effect of this arrangement?

I. We maintain *that it was a release from the Yirmouth mortgage to the corporation of the extra four per cent. upon which no lien was secured, and not an assignment of an interest in the mortgage.*

The agreement on the part of the Yarmouth contributors was with the corporation. No consideration moved between them and any other party. They assumed no responsibility in regard to the four per cent. after its release. By the vote of the stockholders proposing the arrangement, it was to go into the hands of the Treasurer, "*for the use and benefit of the company.*" The company was thus authorized to use it as it could the other earnings of the road.

Prior to this arrangement the Yarmouth contributors were entitled to the whole gross receipts of that part of the road, without any deduction for operating expenses.

By it they consented that the Trustees should pay to the Treasurer of the company all the earnings to which they were entitled, except three per cent. semi-annually, which they would reserve in full ror the annual interest to which they were entitled under their mortgage. Their receipt for this amount was a dischaage of the claim for interest. It was a receipt in full, leaving no claim upon the mortgage for the extra four per cent.

But it was not contemplated that the earnings were to go into the hands of the trustees.

By reference to the Yarmouth mortgage it will be seen that their is an express stipulation that the corporation shoul equip and run the road at its own expense, and pay over the receipts to the trustees. The earnings were in fact to come directly into its own hands and be in its own treasury.

It had operated the road up to this time and the trustees had never been in possossion of its receipts, nor had anything to do with its management; the mortgagors had ever been in poesession.

The arrangement did not contemplate any change. The earnings were expected to go into the treasury of the company, as they had gone up to that time.

The agreement on the part of the Yarmouth contributors was, in effect, that they world receive three per cent. semi-annually in full for their interest, and leave in the treasury of the company the residue of the annual earnings, remitting all claim thereto up to 1870, and assuming no responsibility therefor.

The promise to hold the four per cenr. in trnst, was the promise of the mortgager in possession of the mortgaged property that he would hold a part of the earnings in trust. It was the mere promise of the debtor that he would set apart a certain portion of his income to pay a certain creditor—a mere promise that added nothing to his original agreement to pay.

The earnings of the whole line of the road were turned into the treasury day by day, and blended in a common fund from which the expenses were paid, and there has never been, before or since the arrangement, any separation of the earnings of the Yarmouth portion of the road from the rest of the line; nor any separation of any of the money received into the treasury to pay the four per cent., setting it apart so by itself that a lien could attach.

A lien upon money or its representative cannot be enforced unless the money or a specific substitute for it can be identified.—Drake v Taylor, 6 Bl. C. C. 14.

To constitute an equitable lien on a fund, there must be some distinct appropriation of it by the debtor.—Wright v Ellison, 1 Wall., 16.

There must be a relinquishment by the debtor of the right of dominion over the funds, so that without his aid or consent, the creditor can enforce their application to the payment of his debt.—Dillon v Barnard, 21 Wall., 430, and cases cited page 440.

This agreement, in respect to a lien, was executory, and was never executed.

It was the contemporaneous construction of all parties that the arrangement amounted to a release to the corporation of the four per cent., for its own use and benefit. The language of the vote is explicit, that it was to go into the treasury "*for the use and benefit of the company.*"

With this the preferred stockholders were content, as it increased the fund from which they would be the first to receive dividends.

Their new certificates made no references to the four per cent., nor to any funds held in trust. They contained the naked promise of the corporation to pay the dividends, and the holders received them relying on that promise alone. They asked no assurance from the trustees. They claimed no lien upon the mortgage nor upon any funds. They knew that they must look to the corporation, for it was the corporation alone that could determine who was entitled to divididends, and when and what amount could be paid.

If they had had a lien their conduct would have waived it; for the right of lien is waived when the party that has it enters into an agreement inconsistent with its existence, or conducts in a manner inconsistent with its preservation.—2 Kent's Com. 638. Spaulding v Adams, 32 Me., 211.

Twenty years of such conduct by the complainants would seem to be sufficient to constitute a waiver of any lien they claim to have had.

We will briefly call attention to another adequate ground of defence.

II. *The four per cent. remitted was usurious interest unauthorized by law.*

Until March 11th, 1870, the legal rate of interest in Maine was *six per cent*; and the Statutes provided that in any action brought on any contract whatever in which there is, directly or indirectly, taken or reserved, a rate of interest exceeding the legal rate, the defendant may, under the general issue, prove such excessive interest, and it shall be deducted from the amount due on such contract.—R. S. 1841, p. 317. R. S. 1857, p. 322. Acts 1857, p. 95.

The contract with the Yarmouth contributors to pay them ten per cent. upon their loan, was usurious. It was a loan, secured by mortgage upon the road, and the calling the certificates stock instead of bonds, was a devise to cover the usury. The payment of this usurous interest would not have been inforced against the old corporation; and the release of the excess by the contributors, and the promise of the company to pay in the future to the preferred stockholders, or to hold in trust for them this usurous excess, does not remove the taint of usury, or give to these stockholders, who had knowledge of the illegal rate of interest stipulated in the Yarmouth contract, any legal right to recover this usurous excess.

III. The Trustee, Patten, and the new corporation are not liable

in this action, for the reason that they are strangers to the contract respecting the four per cent.

Trans. pp 36-50 & 51

The suit is against Patten, as Trustee of the second mortgage bondholders, and not as Trustee in the Yarmouth mortgage, and against the P. & K. R. R. Corporation as the representative owners of the second mortgage bonds and of the title to the railroad secured by that mortgage. Neither had anything to do with this contract. It was not concluded until Sept. 1, 1853, when the first preferred stockholders took this new certificate of stock. Their right and interest in the mortgaged property originated Oct. 15, 1852, at the date of the mortgage deed to the Trustees, securing the bonds now represented by the corporation.

A sucsequent agreement between other parties cannot impair their rights in the property, or impose upon them new liabilities.

The lien claimed by the plaintiffs, was upon *the earnings* of the road, and not upon the road itself. The whole stipulation related to the earnings. Nowhere is there any intimation that it was supposed that the claim was upon the real estate; and when the title of the holders of the second mortgage bonds was prefected by the forecloseure of their mortgage, which antedated the arrangement under which the complainants claim, they took the property unaffected by their claim.

If it were true that the arrangement in respect to the four per cent., was an assignment of that interest in the Yarmouth stock, the new corporation would not be liable therefor in this suit. They held their title from the Kennebec & Portland, Railroad Co., the mortgageors in the Yarmouth mortgage, in possession of the mortgaged property by consent of mortageors, taking rents and profits. They are not liable to account to the complainants, until they obtain judgment for possession.

Trans. pp 43 & 44

After the forecloseure the defendant corporation had the title of the mortgagors in the Yarmouth mortgage, in possession, operating the road, taking the income, and in no way a party to the agreement under which the complainants claim. The income of the road was the property of defendants until the holders of the Yarmouth mortgage took possession, or required the income to be paid to them.—Galveston Railroad v Cowdrey, 11 Wall. 449. Gilman v Ill. & Miss. Tel. Co., 91 U. S. 603. Noyes v Rice, 52 Me., 115. Fitchburg M'g. Co., v Melven. 15 Mass., 268. Boston Bank v Reed, 8 Pick. 459. Mayo v Fletcher, 14 Pick,, 533.

And if the arrangement carried to the complainants an interest in the Yarmouth mortgage that followed the mortgaged property, then it is the Trustees in that mortgage, and not these defendants, on whom the complainants should call for the vindication of their rights.

It is a singular fact that the only person indicated in any part of the agreement under which a trust is claimed, was the Treasurer of the old corporation, and he is not made a party to the bill.

IV. The Laches of the complainant is a just and valid defence to their suit.

For more than seventeen years they made no assertion of their claim. They were silent during all the period that the road was managed by the Trustees. They were silent during all the proceedings for the foreclosure. They were silent when the Trustees made their conveyance to the new corperation. And remained silent for more than seven years after this corporation entered into the possession and management of the road, claiming it as its own property under the conveyance, and while it abandoned that part of the road covered by the Yarmouth mortgage, lying between Westbrook and Portland, and expended large sums of money in making a new road between those points, and in depot grounds and buildings in Portland.

Trans. pp 38-39 43

As to Patten, the bill calls for moneys received while the Trustees were in possession of the road under the mortgages securing the first and second mortgage bonds. He was one of three Trustees in these mortgages. In obedience to the requirement of the bondholders the Trustees took possession of the road Sept. 1, 1857, and held and operated it until Jan. 1, 1864. They did this under the authority of the Act of 1857, which prescribed their duties and the appropriation of the earnings. It provided that "they shall, from the receipts, keep the road, buildings and equipments in repair; furnish such new rolling stock as is necessary, and the balance, *after* paying the running expenses, shall be applied according to the legal rights of the parties."

Being in possession under this Act, they were bound to appropriate the earnings according to its provisions. This they did. They first paid for repairs and operating expenses as required; and after doing this they had hardly enough left of the earnings to pay six per cent. on the city and town loan secured on the whole line of the road, and a like interest of six per cent. on the Yarmouth stock. They had no right to appropriate the earnings of the other part of the road to meet the expense of operating the Yarmouth part.

The trustees made and published annually their report to the stockholders, of their management of the road and their appropriations of its earnings, of this the stockholders and bondholders had notice And the answer shows that no stockholder, or Yarmouth contributor ever objected to the appropriations made by them. This tacit assent by the complainants is a ratification of the action of the trustees. Not only so, the preferred stockholders looked on in silence when the trustees made their final settlement, gave up possession of the road, and passed from their hands and cortrol all the earnings and property which they then had by virtue of their possession.

This is not the case of a cestui que trust calling upon his trustee to account. The complainants claim as asignees of an interest in the Yarmouth mortgage, and Patten is not called upon as trustee

under that mortgage, but as trustee under the mortgages in which they have no interest.

The case is not one of that class of cases which are excepted from the operation of the Statute of Limitation. It is one to which the statute equitably applies.

Courts of equity act in obedience and analogy to the statutes of limitation in all proper cases.

Story's Eq. Jur. Vol. 2, §§ 1520, 1521. W. Smith v Clay, Amb. R. 645. Lord Camden says: "A court in equity which is never active in relief against consience or public convenience, has always refused its aid to *stale demands*, where the party has slept upon his rights and acquiesed for a great length of time."—Hill or Trustees § 168 (Ed. 1857.) Badger v Badger, 2 Wallace 94.

In New Albany v Burke, 11 Wallace, 107, the Court says: No excuse is therefore shown for this long delay, and it is difficult to see why they are not barred by the rule in equity analagous to the Statute of Limitation.

In Badger v Badger & al., 2 Cliff., 107, Justice Clifford says: "Courts of Equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere when there has been gross laches in prosecuting the claims, or long acquiescense." See also cases cited.

The principle that runs through all the cases is, that Courts of Equity will act upon a rule analagous to the Statute of Limitation, and not disregard laches when justice requires it.

In the case at bar, how manifest is the injustice of calling upon the surviving Trustee more than six years after he had parted with all the property of the road and means of indemnifying himself, if required to respond to the complainant's claim; and after both his associate trustees had deceased. If there was any misappropriation of the earnings it was the act of the board, and not of Mr. Patten. He was in the minority, and is not responsible for the action of the majority; and the legal representatives of this majority are not made parties to this bill.

If the complainants would avoid the effect of their laches, they should have set forth specifically in their bill what were the impediments to an earlier prosecution of their claim, when they first acquired a knowledge of their rights and how, and what means the defendants used to keep them from the knowledge; or give a satisfactory reason why it was not sooner obtained.—Stearns v Page, 7 Howard, 819. Badger v Badger & al., 2 Cliff., 154. Marsh v Whitmore, 21 Wall., 178.

The same general principles as to laches that are a defence of Patten are applicable to the case of the new corporation, and furnish it a valid defence also.

V. The complainants were not authorized to commence or pro-

secute this suit, as the corporation in which they are stockholders, has never refused, as far as appears, to adopt the requisite measures to enforce any right they may have in respect to their bill. It is the corporation and not the stockholders, that has the right to call upon the defendants to answer. And it is only when the corporation refuses, that the stockholder is permitted to institute proceedings in his own name to vindicate corporate rights.— Mosely v Alston, 1 Phill. ch. 790. Foss v Harbottle 2 Hare 461. K. & P. R. R. Co., v P. & K. R. R. Co., 54 Me., 173. and cases cited on pages 181 and 182.

VI. If the contract is valid, as claimed by the complainants, they have a clear and adequate remedy by action at law to which they should resort, and this Court has not jurisdiction in equity.

They claim from the new corporation moneys received for overdue dividends. They allege that four per cent. interest on $202,400 has come into its possession annually since the conveyance of the railroad to them, Jan. 1, 1864. If such is the fact, a suit at law is the adequate and proper remedy for its recovery. Any issue that could arise could be determined in such a suit; and the proper remedy is by such a suit, and not by bill in equity.—Bates v A. & K. R. R. Co., 49 Me., 491.

That this Court may know the grounds upon which the decision was placed in the Circuit Court, I beg leave to present a copy of the opinion of the learned Judge.

JAMES W. BRADBURY,

Defendant's Solicitor.